

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

*Orig. Affidavit
by mailing*

77-2015

To be argued by
RICHARD APPLEBY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2015

UNITED STATES OF AMERICA,

Appellee,

—against—

CRUZ ESCOBAR-NEGRON,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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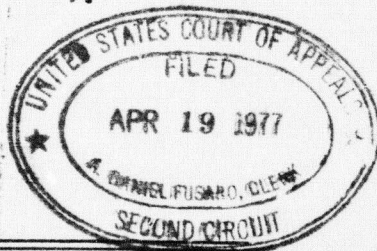


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—against—

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Appellant.

BRIEF FOR APPELLEE

Preliminary Statement

This is an appeal from an order of the United States District Court in the Eastern District of New York (Costantino, *J.*) entered on January 13, 1977, denying Cruz Escobar-Negron's application, pursuant to 28 U.S.C. § 2255, to set aside as illegally imposed a sentence of 12 years imprisonment and a five year period of special parole.¹ The above sentence was imposed on April 13, 1973 after Negron pleaded guilty to a one count indictment charging possession with intent to distribute approximately five ounces of heroin hydrochloride, in violation of Title 21, United States Code, Section 841(a)(1).

¹ In its memorandum decision of January 13, 1977, the Court reduced the special parole term to three years. The memorandum is reproduced as Exhibit B to appellant's appendix.

Statement of Facts

a) The Plea Proceeding

On November 11, 1972, appellant Cruz Escobar-Negron, while traveling under the assumed name of Carlos Rivera, was arrested at LaGuardia Airport together with his common-law wife, Lydia Guzman, as they were about to depart to Puerto Rico. Agents seized five ounces of heroin secreted in Guzman's underwear. At the time of his arrest appellant assumed full responsibility for the transportation of the heroin. Appellant admitted he paid \$3,000 for the heroin and planned to cut it, keep most for his personal use, and sell the remainder. Thereafter Negron and Guzman were indicted in a one count indictment for possessing with intent to distribute the heroin, in violation of Title 21, United States Code, Section 841(a) (1).

On December 5, 1972, appellant appeared before the Court for arraignment on the indictment. When the case was called appellant appeared without his lawyer who was apparently late in getting to court (3). The Court then entered a not guilty plea on behalf of appellant (4). The following colloquy then ensued:

THE COURT:

* * * * *

The Court entered a plea of not guilty in your behalf. Are you familiar with what the charge is?

MR. BERGMAN [A.U.S.A.]: It is a one count indictment.

THE COURT: You are charged—do you know what they say you did wrong? Did anyone tell you?

MR. NEGRON: Well,—

THE COURT: Let me tell you, your name is Cruz Escobar-Negron?

MR. NEGRON: Yes.

THE COURT: Also known as Carlos Rivera?
Is that you, too?

MR. NEGRON: No.

THE COURT: You never used the name
Rivera?

MR. NEGRON: Yes.

THE COURT: It says here you had heroin.
Do you know what heroin is? You had heroin
and that you possessed it. That means you had
it and you were going to get rid of it yourself.
You were going to sell it.

You plead not guilty, right?

MR. NEGRON: Yes.

On February 20, 1973 appellant appeared before the Court and withdrew his previously entered plea of not guilty and entered a plea of guilty to the one count of the indictment. Appellant was represented by retained counsel, Jack Soloman. Appellant, a native of Puerto Rico, did not require an interpreter, and there is no claim that he did not understand any part of the proceedings because of language difficulties.

At the beginning of the plea proceeding, the Court granted counsel a recess so that he could discuss the case with the Assistant United States Attorney in charge of the case, Paul Lazarus (C4).² When the case was called again, counsel stated that he had consulted with appellant and intended to plead guilty to the one count

² The plea of guilty minutes are reproduced as Exhibit C to appellant's and the sentencing minutes as Exhibit D. The following designations are used herein:

"C"—transcript of February 20, 1972 (plea proceeding).

"D"—transcript of April 13, 1973 (sentencing proceeding).

indictment (C4). Counsel also stated for the record that it was part of the plea agreement that the Government would move to dismiss the indictment against appellant's common-law wife, Lydia Guzman (C 4-5).

Before advising appellant of his rights, the Court stated:

THE COURT: I am going to talk to him now. I cannot accept the plea without going through the strict form and have him understand the plea and give the reasons for his plea.

After making this statement, the Court inquired fully into appellant's understanding of the consequences of his intention to plead guilty. Appellant stated that he did understand that he was pleading guilty to the one count indictment; that he had the right to continue to plead not guilty and have a jury trial; that he had a right to summon witnesses to prove his innocence; that if the Government failed to meet its burden he would be acquitted; that he had a right not to incriminate himself by taking the stand and that no adverse inference could be drawn by the jury for not taking the stand (C 5).

At this point in the proceeding, the Court asked appellant to "tell me in your own words what you say you have done wrong in violation of the United States law. What did you do?" (C 5). The following colloquy then took place:

THE DEFENDANT NEGRON: I tell you the truth. I plead guilty because I know I did a crime—

THE COURT: Just tell me what you did.

THE DEFENDANT NEGRON: I forced my wife to possess narcotics and take it to Puerto Rico for me.

THE COURT: What kind?

THE DEFENDANT NEGRON: Heroin.

THE COURT: Do you remember how much?

THE DEFENDANT NEGRON: I don't—about five ounces. I passed this because I use narcotics. You study my case and see if I can go to the hospital.

THE COURT: Are you an addict?

THE DEFENDANT NEGRON: Yes.

THE COURT: For how long have you been an addict?

THE DEFENDANT NEGRON: I started when I was thirteen, fourteen.

THE COURT: Have you had any treatment or been incarcerated for it, for any reason?

THE DEFENDANT NEGRON: I went one time, three months in the hospital in Puerto Rico but I quit and started using dope again.

THE COURT: Do you have any objection if the Court sees fit to have you examined to see if you are an narcotics addict and be certified as one? You have no objection to that?

THE DEFENDANT NEGRON: Oh, no sir. I have no objection.

THE COURT: All right. Let's see now. Now, at this time you had this heroin and your wife was a party to it. You knew that it was wrong to possess heroin?

THE DEFENDANT NEGRON: Yes sir.

THE COURT: And to distribute heroin?

THE DEFENDANT NEGRON: Yes sir.

THE COURT: And you knew it was a violation of the laws of the United States?

THE DEFENDANT NEGRON: Yes.

THE COURT: And you knew that crime could subject you to a jail term, right?

DEFENDANT NEGRON: Yes.

THE COURT: This Court now advises you, and this is the maximum—well, there are several things. You can be examined and found to be an addict and the Court determines what to do with you.

Number two, you are subject to a \$25,000.00 fine and up to 15 years in jail or both with a special parole term. That is the maximum. That is all in the Court's discretion as to what happens to you. Do you understand that?

THE DEFENDANT NEGRON: Yes.

The Court accepted the plea (C 10). The Court then advised appellant of the possibility and consequences of his being sentenced under the Youth Corrections Act (C 9-10). The Court also advised appellant that he could be sentenced pursuant to the Narcotic Addict Rehabilitation Act (C 10).

b) The Sentencing Proceeding

On April 13, 1973 appellant appeared before the Court for sentencing with his counsel, Mr. Soloman. Counsel first stated that appellant had only one prior federal conviction for forgery (D 3). However, the Court informed counsel that the probation report indicated an extensive prior criminal involvement (D 4). The Court

then granted a recess to counsel so that he could study the probation report (D 5).

The probation report stated that appellant had initially admitted he had paid \$3,000 for the heroin and planned to cut it, keep most of it for personal use, and sell the remainder. Later appellant denied he planned to sell any of the heroin. Further, the Probation Department filed a supplemental memorandum to the probation report which stated:

The presentence report reflects defendant's statement to the effect that the heroin he possessed was for his own use and he used 25 to 30 bags a day personally. This is questionable however, since a medical report received from Federal Detention Headquarters (copy attached) disclosed that when defendant was examined on November 11, 1972 he advised he last snorted heroin on November 10, 1972. Further, the medical report revealed that the defendant did not undergo any narcotic withdrawal symptoms and that "due to past history and physical examination this man would not be classified as an active addict."³

After the recess, counsel acknowledged that his client had twenty-one prior arrests (D 5). He then portrayed appellant as "a reasonably intelligent young man" and that his involvement in the crime was due to his addiction (D 6). The Court then allowed appellant to speak in his behalf and appellant stated that all the crimes he committed were as a result of his addiction (D 7-8). When the probation officer, who was present at the sentencing, heard this remark, he stated that, with respect to appel-

³ This language is from page 3 of the probation report. We agree with the suggestion of appellant (Br. p. 7) that the entire report should be made part of the record on appeal. Accordingly, we will have copies of this report at oral argument if the Court wishes to examine it.

lant's assertion that he is an addict, "[i]t may be noted that he was interviewed at Federal Detention Headquarters immediately after his arrest, and he denied using drugs, and he was classified not as an addict" (D 8). Counsel then asked the Court to look at appellant's arm for signs of fresh tracks, which the Court did (D 9). Both the probation officer and the Court observed that the track marks were "old, old tracks" (D 9). Having found appellant's claim of addiction disingenuous, the Court observed:

THE COURT: Five and a half ounces of heroin is enough for anybody to be put away. They complain about one ounce of heroin. Five and a half ounces is a lot of heroin.

He was going into the business and he intended to stay in that business. His record is replete with all of his background, and it may very well be petty larceny was started out in order to get monies to take care of his habit, but then he graduated. He finally graduated. He was going to help everybody else, too, by selling it. He is a graduate, that's what he is.

MR. SOLOMON: Twenty five year old male, to have spent—

THE COURT: He went from the user to the graduate school of the pusher, and that's what he is. This Court is ready to sentence him.

This Court sentences him to twelve years in jail and five years special parole" (D 9-10).

At the conclusion of the sentencing, the Government dismissed the indictment against Guzman.⁴ Finally, the

⁴ Guzman's present whereabouts are unknown, thus rendering a prosecution against both Guzman and appellant extremely difficult.

Court advised appellant that he could move to modify his sentence (D 11).

c) Section 2255 Proceedings

On January 29, 1975, appellant filed his §2255 petition in the district court. Appellant was not acting *pro se* but retained a private lawyer, Oscar Gonzalez-Suarez. The petition, signed by appellant, alleged that the Court, "inadvertently perhaps", (Petition, p. 1) failed to advise appellant of the maximum range of the special parole term. The petition also alleged that the Court relied on erroneous information in the presentence report. The petition and the accompanying memorandum of law were devoid of any statement to the effect that appellant did not understand the charges against him or that a factual basis did not exist for the plea. Furthermore, appellant's petition was devoid of any statement that he would not have pleaded guilty had he been advised of the mandatory nature of the special parole term.

On January 12, 1976, the Court denied the petition in all respects. However, relying on *Poerio v. United States*, 405 F. Supp. 1374 (E.D.N.Y. 1975) (Judd, J.) and *Aviles v. United States*, 405 F. Supp. 1258 (S.D.N.Y. 1975) (Palmieri, J.), *aff'd*, 538 F.2d 307 (2d Cir. 1975), the Court reduced appellant's special parole term from five to three years.

A R G U M E N T

POINT I

The record established that appellant understood the nature of the charges against him and that there was a factual basis for the 1973 plea of guilty.

Relying upon *McCarthy v. United States*, 394 U.S. 459 (1965) and *Irizarry v. United States*, 508 F.2d 960 (2d Cir. 1974) appellant asserts that the record is devoid of any indication that appellant understood the nature of the charges against him and that therefore the February 1973 plea of guilty was defective. He also claims that there was no factual basis for the plea because there is no indication that he intended to distribute the heroin to persons other than his wife. The Government's position is that, viewing the entire record in the context of the then extant Rule 11, Fed. R. Crim. P.,⁵ there is sufficient basis to sustain, at this late date, the plea of guilty against collateral attack. We contend that due to the amount of heroin involved, detailed inquiry into appellant's intent was not required, and even if he had disclaimed an intent to distribute, the plea of guilty would still be valid.

⁵ Rule 11 then provided:

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

a) Appellant's understanding of the nature of the charge

On December 5, 1972 appellant appeared before the district court for arraignment on the indictment. As indicated in Statement of Facts, the Court explained to appellant in layman's terms, the charge against him:

THE COURT: It says here you had heroin. Do you know what heroin is? You had heroin and that you possessed it. That means you had it and you were going to get rid of it yourself. You were going to sell it.

You plead not guilty, right?

MR. NEGRON: Yes.

This clear explanation of the charge at arraignment is sufficient notice to appellant of the nature of the charge. See *Henderson v. Morgan*, 426 U.S. 637, 650 n.2 (1967) (concurring op. of Justice White). We submit that this colloquy clearly established that appellant understood the nature of the charge. That is what is required by Rule 11; and the requirement was met. Cf. *Irizarry v. United States*, *supra* at p. 963.

Moreover, conspicuously absent from appellant's petition below (where he was represented by retained counsel), as well as on the instant appeal, is any statement to the effect that appellant did not, in fact, understand the charge against him. This is not surprising in view of the fact that appellant pleaded guilty to a simple one count indictment charging him with possession, with intent to distribute, five ounces of heroin and, as set forth above, had evidently understood the nature of the charge. This was not a case where there was a danger that appellant intended to plead guilty to a lesser included offense or to a different count in the indictment which may have carried a greater penalty. See *Irizarry v. United States*, *supra* at p. 963; *McCarthy v. United States*, *supra* at p. 467. Nor was this a difficult crime

for a defendant to comprehend, such as conspiracy or income tax evasion. *Irizarry v. United States*, *supra* at p. 965. *McCarthy v. United States*, *supra* at p. 467. This was not a case where the defendant acknowledged his guilt in an ambiguous fashion. *Rizzo v. United States*, 516 F.2d 789, 794 (2d Cir. 1975). See also *United States v. Kloner*, 535 F.2d 730, 734 (2d Cir. 1976). On the contrary this was an extremely simple case of a defendant caught redhanded in an attempt to body carry five ounces of heroin from New York to Puerto Rico.

The record establishes that appellant was represented by retained counsel. The record of the plea proceedings further reflects that counsel and appellant had discussed the nature of the charges prior to the commencement of the proceedings (C 3). But even if the record had not reflected this fact, it can be presumed that counsel did discuss the charge with his client. As the Supreme Court stated in *Henderson v. Morgan*, *supra* at p. 647: "Normally the record contains an explanation of the charge by the trial judge, or a representation by defense counsel that the nature of the offense has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explains the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." The plea colloquy between appellant and the Court indicates that appellant was not in the least bit confused as to the nature of the proceedings. As his lawyer described appellant, then 25 years old,⁶ at sentencing, "... this man is a reasonably intelligent young man," (C 6). In connection with questioning by the Court concerning the rights appellant would be waiving as a result of his plea, there are several references in the record to "this indictment" and to "this

⁶ Appellant stated to the Court that he was 24 years old. However, this was apparently untrue because the probation report reflects he was 25 years old at the time of the plea.

one count indictment" (C 5). Appellant repeatedly indicated that he understood these rights and nevertheless persisted in his desire to plead guilty to the indictment.

Appellant's statement as to his complicity in the crime further reveals that he understood the nature of the charges against him and that it was necessary for him to establish a basis for the elements of the crime. Moreover, the probation report indicates that appellant was no stranger to criminal proceedings. Appellant had been arrested 21 times in the past (six convictions) for crimes ranging from attempted murder to grand larceny to check forgery (for which he served three years in Atlanta Federal Penitentiary). Indeed, it is no wonder that appellant has *never* claimed he did not understand the charges against him.

As the Supreme Court stated in *McCarthy*, just how much explanation of the charges is necessary in each particular instance will vary from case to case. *McCarthy*, *supra* at p. 467 n. 20. In view of the Court's explanation of the charge at arraignment, of the simplicity of this crime, appellant's extensive criminal record, his level of intelligence, the fact that he was represented by counsel, and his evident ability to comprehend what was being said to him, we submit that the Court's explanation of the charges was adequate. See *Irizarry v. United States*, *supra* at p. 464 n.3; *Eagle Thunder v. United States*, 477 F.2d 1326, 1328 (8th Cir.), *cert. denied*, 414 U.S. 873 (1973).

b) Factual basis for the plea

Appellant argues that there is not a sufficient factual basis in the record for the plea of guilty. It is argued that there is no basis to conclude that appellant intended to distribute the heroin. We disagree.

When the Court asked him what he did that made him guilty of the crime, appellant stated: "I forced my wife to possess narcotics and take it to Puerto Rico for me" (C 7). Thus, the basis for the element of possession was established. The Court then inquired of appellant what substance was involved and in what quantity. Appellant stated that it was approximately five ounces of heroin (C 7). Then appellant stated: "I passed this because I use narcotics" (C 7). The word "pass" is obviously narcotics vernacular for "distribute," the second key element of the crime. On the basis of these statements alone, the factual basis was met. However, later in the transcript, the Court inquired of appellant as follows:

THE COURT: All right. Let's see now. Now, at this time you had this heroin and your wife was a party to it. You knew that it was wrong to possess heroin?

THE DEFENDANT NEGRON: Yes sir.

THE COURT: And to distribute heroin?

THE DEFENDANT NEGRON: Yes sir.

THE COURT: And you knew it was a violation of the laws of the United States?

THE DEFENDANT NEGRON: Yes sir.

THE COURT: And you knew it was a crime?

THE DEFENDANT NEGRON: Yes.

THE COURT: And you knew that crime could subject you to a jail term, right?

DEFENDANT NEGRON: Yes.

If there was any ambiguity as to the word "pass" earlier in the transcript, it was clarified when appellant stated that he knew it was "wrong" to "distribute" heroin.

Not to be overlooked is that appellant's lawyer was standing at his side during the entire proceeding and that the two had conferred during a recess concerning the indictment. It seems not unreasonable to assume that if there had been any question about appellant's intention to distribute the heroin this would have been raised at the proceeding. Indeed, the fact that this was not raised in the original petition strongly suggests that there is no question that the record is sufficiently clear on this issue.

Appellant argues that his statement to the Court that he distributed the heroin "because I use narcotics" is somehow contradictory of an intent to sell the heroin. We see no such necessary contradiction. Even assuming for purposes of this argument that appellant was an addict (But see Point III), it is entirely possible that he intended to distribute the heroin to support his habit. What motivation there was for the distribution is, however, irrelevant in terms of his factual guilt.

To be distinguished is *Henderson v. Morgan, supra*, cited by appellant in support of his position that the judge's inquiry was inadequate concerning his intent to distribute the heroin. There the Supreme Court held that a plea of guilty to second degree murder should be vacated in view of the fact that, after a full hearing in the district court, it was found that 1) petitioner was not advised by court or counsel prior to his plea, nor was he aware of, the elements required to be established for any degree of homicide; (2) petitioner was not advised by counsel in court, at any time, that an intent to cause the death or a design to effect the death of the victim was an essential element of second degree murder; and (3) that petitioner was a mental defective with an I.Q. of between 68 and 72. Petitioner also had testified that

he would not have pleaded guilty if he had known that an intent to cause the death of his victim was an element of the offense of second degree murder. At the conclusion of its opinion, the Court stated: "There is no need in this case to decide whether notice of the true nature, or substance, of a charge always requires a description of every element of the offense; we assume it does not. Nevertheless, intent is such a critical element of the offense of second degree murder that notice of that element is required." *Henderson v. Morgan, supra* at p. 647. n.18.

The instant case is quite unlike a murder case where, depending on the degree of his intent, the defendant could be charged with one of several degrees of homicide. Under the federal narcotics statutes the question is whether the defendant intended to distribute the narcotics or whether he did not; the crime is not further broken down (except in the case of simple possession under 21 U.S.C. § 844 (a)) into levels of culpability depending on the degree of intent. Further, and most importantly, appellant's possession of five ounces of heroin made it extremely unlikely that he intended to use it all for his personal use. If appellant had gone to trial the Government could have properly argued that there was a proper inference of distribution from the possession of this quantity of heroin. It would be anomalous, then, to require a higher degree of proof for the purposes of a plea of guilty. In any event, we need not reach the question of whether this possession, alone, would have established a factual basis for the plea, since there was an admission that he knew it was wrong to distribute heroin. In the context of this

answer no other conclusion is possible but that he had possessed the heroin intending to distribute it.⁷

POINT II

Appellant was adequately advised by the court of the special parole term.

Appellant claims that his plea should be vacated because the judge did not fully explain to him the significance of the special parole term. In making this assertion, appellant states that the Government agrees that he was not adequately informed of the special parole

⁷ We also submit that under the circumstances of this plea, accepted under former Rule 11, it was not necessary for appellant to admit to all the elements of the crime. Under the holding in *North Carolina v. Alford*, 400 U.S. 25 (1970), the fact that a defendant does not admit each element of the crime is not sufficient to invalidate a guilty plea. In *Alford*, the defendant, far from not being asked about an element of the crime, *denied* having committed the crime at all. Nevertheless, the Court upheld the plea because it was a sound tactical decision based upon the strong evidence against the accused and the possible severe penalty as a result of a conviction for first degree murder. The Court relied heavily upon the fact that "defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage." *North Carolina v. Alford*, *supra* at p. 31.

At the outset of the plea proceeding, counsel for appellant specifically referred to the fact that the inducement for appellant to plead guilty was the dismissal of the indictment against his common-law wife, Lydia Guzman (C. 3-4). It will also be recalled that upon the arrest of the two, appellant immediately accepted full responsibility for the heroin. In light of appellant's desire to prevent his wife from suffering a criminal conviction, coupled with the overwhelming strong case against both of them, and in light of the holding in *North Carolina v. Alford*, *supra*, the district court would have been justified, we submit, in accepting appellant's plea despite a denial of guilt.

term. The Government made no such concession and we make none. Indeed, we submit that in light of all the circumstances, appellant was adequately put on notice as to the special parole term.

The relevant part of the plea proceeding was as follows:

THE COURT: This Court now advises you, and this is the maximum—well, there are several things. You can be examined and found to be an addict and the Court determines what to do with you.

Number two, you are subject to a \$25,000.00 fine and up to 15 years in jail or both with a special parole term. That is the maximum. That is all in the Court's discretion as to what happens to you. Do you understand that?

THE DEFENDANT NEGRON: Yes.

Thus, the Court did advise appellant of the special parole term, albeit without notifying him of its full consequences. Appellant affirmatively stated that he understood he was subject to a special parole term. Moreover, at the beginning of the proceeding appellant's retained counsel had stated to the Court that he had consulted with his client concerning the plea. In raising this claim below, appellant failed to claim any prejudice as a result of the judge's failure to explain to him the full ramifications of the special parole term. Appellant did not claim below, nor does he here, that he would not have pleaded guilty if he had known of the maximum and minimum provisions of the special parole term. Finally, appellant's sentence was subsequently reduced to a term which cannot exceed the maximum imprisonment term of which he was advised (i.e. 15 years). In light of all these facts, we submit the plea should not be disturbed.

We do not disagree that at the time of this plea the Court was required to advise appellant of the fact that he was subject to a special parole term. See *Michel v. United States*, 507 F.2d 461 (2d Cir. 1974); *Ferguson v. United States*, 513 F.2d 1011 (2d Cir. 1975). And, for the purpose of this argument, we will not disagree that the Court's failure to advise defendant concerning the existence of a special parole term can be raised in a § 2255 petition. See *Ferguson v. United States*, *supra*; but cf. *Davis v. United States*, 417 U.S. 333, 346 (1974); *Hill v. United States*, 368 U.S. 424, 426 (1962). However, what we contend is that the Court was not required to do anything beyond advising a defendant of the existence of the special parole term. This Court in *Michel* only held that the defendant should be advised of the special parole term and to determine if he understands that he will be so sentenced. *Michel v. United States*, *supra* at p. 463. This is the clear implication of the language in *Michel* that "[w]hen a defendant, represented by and in the presence of counsel, states that he does understand the meaning of a consequence of a plea of guilty, we see no need for further inquiry." (*Id.* at 461; emphasis added). Significantly, appellant has been unable to cite a case in support of his argument that more is required. The principal cases cited by appellant, *Ferguson v. United States*, 513 F.2d 1011 (2d Cir. 1975) and *Bye v. United States*, 425 F.2d 177 (2d Cir. 1970), involved situations where the court simply failed to advise that the defendant would be subject to a special parole term or be ineligible for parole. They do not require that the special parole term be explained.

We submit, however, that *Davis v. United States*, 417 U.S. 333 (1974), which sets forth the standard in § 2255 petitions, does not permit a challenge to the conviction on the ground that the special parole term was not adequately explained. There the Court held that absent a constitu-

tional or jurisdictional defect, in order to prevail on a § 2255 petition, the petitioner must demonstrate a fundamental defect which inherently results in a miscarriage of justice. *Davis, supra* at p. 346. The Court stated:

"... collateral relief is not available when all that is shown is a failure to comply with the formal requirements of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error." *Davis, supra* at p. 346.

As stated above, appellant has been unable to show prejudice. He has not claimed that he would not have pleaded guilty if he had been told of the minimum-maximum consequences of the special parole term. He made no effort below to submit an affidavit from his counsel to the effect that the ramifications of the special parole term were not explained to him. Accordingly, under the doctrine of *Davis*, appellant's petition does not set forth a fundamental defect resulting in a miscarriage of justice. See also *Bachner v. United States*, 517 F.2d 589, 597 (7th Cir. 1975); *Gates v. United States*, 515 F.2d 73 (7th Cir. 1975); *Poerio v. United States*, 405 F. Supp. 1258 (E.D.N.Y. 1975) (Judd, J.) (failure of district court to advise petitioner of existence of special parole term harmless error where co-defendant, who was in earshot, was so advised); *Aviles v. United States*, 405 F. Supp. 1374, 1378 (S.D.N.Y. 1975) (Palmieri, J.) (failure of petitioner to allege he was misled to his prejudice, when district court failed to advise of special parole term, is fatal to claim).

Easily distinguished is *Ferguson v. United States, supra*, and *Bye v. United States, supra*, where each petitioner submitted an affidavit stating that he would not have pleaded guilty if he had known of the existence of

the special parole terms or of his ineligibility for parole. Significantly, in *Michel*, where this Court affirmed the denial of the petition, the Court placed emphasis on the fact that petitioner did not make a strong factual showing that he had not understood the special parole term. *Michel v. United States*, *supra* at p. 464. Here, as stated above, there has been no showing whatsoever.⁸

POINT III

The district court acted within its discretion when sentencing appellant.

Relying upon *United States v. Tucker*, 404 U.S. 443 (1972), *Townsend v. Burke*, 334 U.S. 736, 740-741 (1948); *United States v. Robin*, 545 F.2d 775 (2d Cir. 1975); *United States v. Stein*, 544 F.2d 96 (2d Cir. 1976); *United States v. Malcolm*, 432 F.2d 809, 814 (2d Cir. 1970) and *McGee v. United States*, 462 F.2d 243, 245-247 (2d Cir. 1972), appellant claims that his sentence of twelve years resulted from the judge's erroneous finding that he was not an addict. The above-cited cases are totally inapplicable here because, in each of those cases, it was determined that the sentencing judge had, in fact, relied on, or, as in *Robin*, probably did rely on, erroneous information. No evidence, other than appellant's self-serving assertion, has been presented which indicates that the Court was incorrect in its finding that appellant was not an addict at the time of the sentencing. In fact, all the evidence then available established that appellant was not an addict. As indicated above, the Court, prior to sentencing, was in receipt of a

⁸ Appellant's argument that he was misled in being advised that he had no right to appeal is disingenuous. The general rule is that a plea of guilty waives the right to take an appeal from the conviction, absent express preservation of the right to appeal. See *United States v. Faruolo*, 506 F.2d 490, 491 n. 2 (2d Cir. 1974).

supplemental memorandum, together with a medical report, that revealed that appellant was not an addict. The report stated that "due to past history and physical examination this man would not be classified as an active addict." Moreover, the Court and the probation officer, who was also present at sentencing, personally examined appellant's arms and found only old track marks. The judge therefore, was well within his discretion in crediting the medical report, the probation report and his personal observations rather than appellant's claim.

As this Court stated in *United States v. Holder*, 412 F.2d 212, 214 (2d Cir. 1969): "Our power to review a sentence imposed by a district judge is extremely limited." In *Holder* appellant claimed *inter alia* that the probation report was erroneous in certain respects. The Court stated in language applicable here that it was not error "... to consider the contents of the probation report and to rely upon the statements contained therein, nor error for the Court to discredit appellant's attempt to soften the impact of the report's conclusion." *United States v. Holder*, *supra* at p. 215. In short, it appears that appellant's attack here stems from an unhappiness with the length of his sentence, a factor which has never been considered a basis for review. *United States v. Seijo*, 537 F.2d 694, 700 (2d Cir. 1976).

CONCLUSION

The judgment of conviction should be affirmed.*

Respectfully submitted,

Dated: April 14, 1977

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* The United States Attorney's Office wishes to express its appreciation to Margaret Vaughan, a Fordham Law School student, for her assistance in the preparation of this brief.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK

} ss

DOLORES M. BYRD

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 19th day of April 1977 he served a copy of the within
BRIEF FOR APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:
Phylis Skloot Bamberger, Esq., Legal Aid Society, 509

U. S. Courthouse, Foley Square, New York, New York 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Eastern District~~, Borough of Brooklyn, County
of Kings, City of New York.

Dolores M. Byrd

Sworn to before me this

19th day of April 1977

Carolyn N. Johnson
CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4618248
Qualified in Queens County
Term Expires March 30, 1979